IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 587 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE Sd/-
HONOURABLE MR.JUSTICE SHARAD D.DAVE Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHARATBHAI JASUBHAI THAKOR - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MS BANNA S DUTTA for Appellant(s) : 1,
MS FALGUNI PATEL, ADDL PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 26/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant came to be tried by the Sessions Court, Kheda camp at Anand for offence of murder of his wife Champaben allegedly committed by him on 26.5.1998 at about 10.30 A.M. in his residence in Avakar Society at Anand by setting the deceased to fire. The Trial Court found him guilty for the offence of murder and offence of subjecting his wife to cruelty punishable under Sections 302 and 498-A of the Indian Penal Code respectively and sentenced him to undergo imprisonment for life and to pay fine of Rs.1,000/-, in default to undergo simple imprisonment for a period of three months for the offence of murder. The Trial Court did not award any separate sentence for offence punishable under Section 498-A of the IPC. The judgment was rendered by the Trial Court on 17.05.2000 in Sessions Case No. 197 of 1998 and hence, this appeal.

2. The facts of the prosecution case, in brief, are that the appellant was married to Champaben and from the wedlock, there were two children. The appellant used to ill-treat the deceased because of his illicit relations with another lady Seema with whom he had eloped in past. In respect of this elopement, a complaint was also lodged with police by deceased Champaben. The strained relations resulted into the spouses staying separately. However, at a later stage, because of intervention of the relatives, a settlement was arrived at, where-under the appellant gave a written undertaking not to cause any harassment to the deceased and not to ill-treat in

any manner. Thereafter, the spouses started staying together, but, once again, the appellant, because of his interest in Seema, started ill-treating his wife Champaben.

2.1. On the day of the incident, there was an altercation between the two. The appellant is alleged to have given a stick blow on the head of the deceased and, thereafter, set the deceased to fire after pouring kerosene on her. It is the prosecution case that, after doing this, the appellant left the house after bolting the door from inside; while remaining outside; by getting access to the stopper from window. As per the prosecution case, this entire episode was witnessed by appellant' son Paresh, a young child. The appellant went to his father-in-law and informed that Paresh has fallen ill. The parents of the deceased, therefore, rushed to the house and found that Paresh was standing at the house and Champaben was lying inside the house in burnt condition and that she had expired. As a result, father of the deceased Ravjibhai Ramsibhai Thakor lodged an F.I.R. with police, on the basis of which, offence was registered and investigation was started. Panchnama of place of incident, inquest panchnama, postmortem, etc. was done. Statements of the witnesses were recorded. The accused was arrested and, ultimately, chargesheet was filed in the Court of J.M.F.C., Anand. As the case was triable exclusively by the Court of Sessions, the case was committed to the Sessions Court and Sessions Case No.

197 of 1998 came to be registered.

3. Charge against the accused was framed at Exh.4, to which the accused pleaded not guilty and claimed to be tried. The prosecution led evidence and the Trial Court, after considering the evidence led by the prosecution, came to a conclusion that the prosecution was successful in establishing the charges against the appellant and recorded the conviction as stated above.

4. We have heard learned advocate Ms. Dutta for the appellant and learned Additional Public Prosecutor Ms. Falguni Patel for the State. We have gone through the record and proceedings keeping in light the contentions raised before us by the rival sides.

5. Learned advocate Ms. Dutta submitted that the case of the prosecution depends mainly on the deposition of child witness Paresh Exh.19. When he deposed, he was less than 7 years of age and oath was not administered by the Court. Ms. Dutta submitted that, if the deposition of the child is seen, his deposition does not deserve any credence. He appears to be a tutored witness when he admits in his cross-examination that he was told by his grandmother Vimlaben to depose in the Court that his mother was set to fire by his father, i.e. the appellant. Ms. Dutta, therefore, submitted that his deposition may be discarded.

5.1. Ms. Dutta further submitted that the

evidence of Ravjibhai and Vimlaben is adduced by the prosecution to prove the case of cruelty as well as murder. She submitted that neither of these two witnesses knew anything about the incident. So far as cruelty part is concerned, they have approached this Court with improvised version. There was no case of any cruelty in their statement before the police, but, in their deposition, they have improved their version so as to support the prosecution case and secure the conviction and, therefore, their version may not be accepted.

5.2. Ms. Dutta, therefore, submitted that the prosecution has failed to establish the charges, which aspect is overlooked by the Trial Court while recording the conviction. The appeal, therefore, may be allowed and the judgment and order, impugned in the appeal, may be set aside.

6. Learned APP Ms. Patel has opposed this appeal. According to her, eye witness Paresh is the son of the appellant. He is a young boy and his presence at the place of incident is natural. The witness has no reason to falsely implicate the father. So far as tutoring part is concerned, she submitted that the child has been staying with his paternal grandmother (appellant's mother) and, therefore, there was no scope for any tutoring to the child witness. Whatever admissions may have been made by the child witness would be sheerly out of lack of understanding of the court language or inadvertence. On factual aspects, the witness has stood the test of cross-examination and, therefore, his version has rightly been accepted

by the Trial Court.

6.1. Ms. Patel also submitted that, apart from the version of the eye witness, there are certain circumstances and conduct of the appellant, which are very relevant. The circumstances are that, according to the child witness, the appellant had given a stick blow on the head of the deceased, which is confirmed by the medical evidence. The doctor, who performed the postmortem, noticed the similar injury on the head of the deceased.

6.1.1. Ms. Patel also submitted that the appellant has, after the incident, approached the parents of the deceased and given a false information that their son Paresh has fallen ill, whereas he knew that Paresh is quite well and deceased Champaben is no more.

6.2. Mr. Patel submitted that, further, to secure sympathy and to raise a defence, the appellant has tried to assail the character of the deceased by falsely coming out with a theory of the deceased having some illicit relation and the deceased having been found with a love letter purportedly addressed to her paramour, she committed suicide. This theory is propounded by the appellant only to cover up the truth. The conduct is very significant and, therefore, Ms. Patel submitted that the appeal may be dismissed.

6.3. Ms. Patel submitted that, so far as cruelty aspect is concerned, the parents of the deceased

would be the best persons to depose because lady would certainly confide in her parents more than anybody else. She also submitted that the past conduct of the appellant is established by bringing on record the Memorandum of Understanding and the undertaking given by the appellant not to harass the deceased. The harassment, therefore, may be taken to have been proved by the prosecution as has been accepted by the Trial Court. Ms. Patel, therefore, submitted that the appeal may be dismissed.

7. We have gone through the evidence of appellant's son Paresh, which is at Exh.19. Looking to his young age, the trial Court deemed it proper not to administer oath. However, on reading the deposition, we find that the witness has deposed in a very natural way. His presence at the house is also obvious. This witness, in terms, says that the appellant set his mother to fire. He also says that there was altercation between the two and pleads ignorance about the cause. He says that he is staying with his grandmother Kamlaba. He says that he was present in the house when the incident occurred and when his father set his mother to fire, he was crying. His father tried to pacify him and then went away. He says that the house has two doors and the incident occurred near the rear door. He says that even prior to the incident, there were disputes between his parents. His father had given stick blow to his mother in the transaction, which hit the deceased on her forehead. He says that, after setting his mother to fire, his father went to the Station and then his maternal grandparents arrived.

One Shantukaka from neighbourhood also came. They tried to talk to Champaben, but in vain.

7.1. The witness is put to the test of cross-examination. He asserts his presence at the place of occurrence and denies that he had gone to play with Mady, daughter of Shardaben- his maternal aunt. He says that, at the time of the incident, Jethabhai and Jedabhai had come. They tried to push open the door. He denies that he and his father both had entered the house forcibly. He says that he was taught by the mother of his friend Mayuri to implicate his father. He also admits that Vimlaben had asked him to depose that his father had set his mother to fire.

8. We find that the deposition of the witness comes in a very natural and lucid manner. He is young enough not to be party to any concoction and seems to have not understood certain questions put to him during the cross-examination because of technicalities. The boy otherwise asserts his presence in the house, speaks about altercation between his mother and father and then specifically says as to what was done to his mother by his father.

8.1. The witness is found to be so innocent so as to not able to describe number of rooms in the Court. However, he asserts that who was in the house when the incident occurred. He claims to have seen his father giving a stick blow on forehead of his mother. This injury is corroborated by postmortem note Exh.39, where the doctor has recorded a contusion on the forehead of the dead body. This lends

corroboration and support to the version given by the child witness.

9. The prosecution has, then, examined Ravjibhai Ramsibhai Thakor at Exh.20. He is the father of the deceased. He says that the appellant had developed illicit relation with another lady and resultantly used to ill-treat the deceased. The appellant used to take drinks. He says that, in 1995, his daughter had come to his house because of ill-treatment meted out to her by the appellant. He deposed about the elopement of the appellant with one Seema of Navsari and then an application was given by the deceased to Anand Town Police Station on 23.9.1997.

9.1. The witness also says that, on day of the incident, i.e. 26th May, 1998, the appellant came to his shop and told him that Paresh has fallen sick and, therefore, witness should accompany him. He says that, then, he went to the house of the deceased and the appellant and found that his wife Vimlaben was present, Champaben had expired, she had an injry on her head so also on her neck. She was bleeding from her mouth. On inquiry, he was told by the appellant that the deceased had written a chit (to her paramour), which he had found out and he, therefore, gave couple of slaps. According to the witness, that chit was not written by the deceased. Handwritings were not that of the appellant either. According to him, his sister-in-law Kamlaben had adopted the appellant. The witness denies that there was no harassment or ill-treatment meted out to the deceased, that he was informed by the appellant that

the daughter had set herself to fire.

10. The deposition of Vimlaben at Exh.30 is on similar line. She denies specific suggestion that the deceased committed suicide.

11. Medical evidence in form of deposition of doctor Vinay Prassnna- Exh.37 speaks about four external injuries noted by him while performing the postmortem. He also noticed that the deceased had sustained 80 to 100% burns. Contusions and burns injuries were antemortem. The doctor states that the injuries were antemortem, including the burns injuries. He also denies that the death occurred because of suicide and he has expressed an opinion that it was not a case of suicide as can be seen from the position of the body and the injuries.

12. Panchnama of the place of incident is produced at Exh.27. It transpires that kerosene containers were found in the first room, whereas the deceased seems to have sustained burns in the third room located in the hind portion of the house. The deceased was found to be not having any cloths on her body. The panchnama is silent on condition of stopper of the door or condition of the doors but there is oral evidence to the effect that the doors to the house were such that they could be locked from inside by a person while remaining outside the house by inserting hands through a window.

13. The Investigating Officer is examined at Exh.44. After the deposition about the condition of the house and the doors, the Investigating Officer

says that he arrested the appellant on 27th May, 1998, produced him before the Magistrate on 28.5.1998, FSL reports are duly proved and exhibited. The witness admits, during cross-examination, that Gaurishankar and Balkrushna, doing the business of Kulfi have not been cited as witness as their statements did not reveal anything.

14. From the above evidence, we find that the evidence of eye witness- PW 1 Paresh comes in a natural way and inspires our confidence. He could not have been tutored against the appellant as he was in custody of the appellant's mother. The witness has asserted that his father assaulted his mother, caused injury on her forehead, which gets corroborated by medical evidence. The witness then proceeds further to say that there was an altercation between his parents and, ultimately, the father set his mother to fire. The deceased was found in a burned condition, dead.

14.1. In addition to the above eye witness's evidence, there are circumstances, which support the prosecution, viz. that the appellant has come with a false theory of suicide. The doctor, as an expert, has stated that, considering the nature of injury on the body, the deceased could not have committed suicide. The injuries were not suicidal. The appellant has come out with this theory not only by making a suggestion but has tried to create an evidence by showing a chit purportedly written by the deceased to her paramour. This chit was not written by the deceased as can be seen from the deposition of

her father, who specifically denied that they were handwritings of the deceased. The appellant has thereby tried to justify and create evidence to show that the deceased committed suicide when he gave her couple of slaps on finding her love letter purportedly written to her paramour. The appellant has then given false information to witness Ravjibhai that Paresh has fallen ill, whereas he was alright. He has concealed the incident with his wife. This conduct of appellant is very relevant and is reflective of his guilt. The appellant has, thus, tried to create evidence in his favour. We, therefore, of the view that the prosecution has rightly been held to have proved the case of murder of Champaben against the appellant.

15. We may also observe that the appellant has motive for commission of the crime. In past, the appellant has signed an undertaking/ Memorandum of Understanding that he would not ill-treat his wife-deceased Champaben. Deceased Champaben probably was coming in the way of his relationship with Seema. The appellant eloped with her in the past and a complaint in this regard was lodged by the deceased to police as can be seen from Exh.31.

16. Now, coming to the question of cruelty punishable under Section 498-A of the I.P.C., we find that the evidence of Ravjibhai and his wife Vimlaben is too general and vague and mainly relates to the past episodes. Subsequent to which, the appellant had executed Memorandum of Understanding or undertaking,

but, no incident is shown in proximity of time of the incident and as per the definition of cruelty envisaged under Section 498-A of the I.P.C., we are of the view that the conviction under Section 498-A of the IPC cannot be confirmed.

17. In the result, the appeal deserves to be partly allowed and is, accordingly, allowed. The conviction of the appellant under Section 498-A of the Indian Penal Code is hereby set aside. The conviction of the appellant under Section 302 of the Indian Penal Code, as recorded by the Sessions Court camp at Anand in Sessions Case No. 197 of 1998 by judgment and order dated 17.05.2000, is confirmed with sentence.

Sd/-

(A.L. DAVE, J.)

Sd/-

(SHARAD D.DAVE, J.)

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